ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 1, 2004

Ms. Ellen B. Huchital
McGinnis, Lochridge & Kilgore, L.L.P.
3200 One Houston Center
1221 McKinney Street
Houston, Texas 77010

OR2004-2650

Dear Ms. Huchital:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197782.

The Spring Branch Independent School District (the "district"), which you represent, received a request for information relating to the requestor. You inform us that you have released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.107, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You inform us that some of the submitted information relates to a completed investigation that was conducted by the district's police department. The documents that relate to that investigation must be released under section 552.022, unless they contain information that is excepted from disclosure under section 552.108 or expressly

confidential under other law. You do not seek to withhold the investigative documents under section 552.108. You do claim that some of the information contained in those documents is protected by the attorney-client privilege under section 552.107(1). We note, however, that section 552.107(1) is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 630 at 4 (1994) (attorney-client privilege under Gov't Code § 552.107(1) may be waived). As such, section 552.107(1) does not constitute "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the submitted information that is subject to section 552.022 under section 552.107(1).

The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Texas Rule of Evidence 503. Therefore, we will consider whether the district may withhold any of the information that is subject to section 552.022 under Texas Rule of Evidence 503. Rule 503(b)(1) provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
> >
> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
> >
> > (D) between representatives of the client or between the client and a representative of the client; or
> >
> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You inform us that Documents C11-14, which relate to the police investigation, contain hand-written notes that document communications between an employee of and an attorney for the district. You state that the notes document legal advice provided to the district that was confidential and was not intended to be disclosed to third parties. Based on your representations, we conclude that the district may withhold the hand-written notes in Documents C11 through C14 under Texas Rule of Evidence 503.

Next, we address your claim under section 552.101 of the Government Code in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). FERPA is incorporated into chapter 552 of the Government Code by section 552.026, which provides as follows:

> This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Generally, FERPA requires that information be withheld from the public only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978).

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

We note, however, that FERPA excludes from its statutory definition of education records "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." *See* 20 U.S.C. § 1232g(a)(4)(B)(ii). Section 99.8 of title 34 of the Code of Federal Regulations provides in part:

> (b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are –
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> (i) Created by a law enforcement unit;
>
> (ii) Created for a law enforcement purpose; and
>
> (iii) Maintained by the law enforcement unit.

34 C.F.R. § 99.8(b)(1); *see also id.* § 99.3 (defining "education records" as not including "[r]ecords of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8); Open Records Decision No. 612 (1992) (FERPA and statutory predecessor to Gov't Code § 552.114 not applicable to incident and arrest reports of the state university campus police departments).

You assert that documents B3-B6, B9-10, B12-B13, B15-B16, B18-B19, B21-22, B24-B25, B27-B28, B30-31, B37-B40, and C11-14 contain the names of students and other information that the district must withhold from the requestor under FERPA.[1] You inform us that documents B37-B40 are a letter to an administrator of the district from a parent of a student. We conclude that FERPA is applicable to documents B37 through B40. The district must not release information contained in documents B37 through B40 that identifies the parent or the student unless the district has authority under FERPA to do so.

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[1]You inform us that you have redacted the names of students that appear in these documents. In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from the public information that is protected by FERPA and excepted from required public disclosure under sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to the applicability of those sections; and (2) a state-funded educational agency or institution may withhold from the public information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995).

You also state that documents B3 through B36 are from the police department's investigation of complaints regarding the requestor's behavior while he was serving as a parent volunteer and that documents C11 through C14 are pages from the police department's investigative report.[2] Based on your representations and our review of the information, we find that documents B3 through B36 and C11 through C14 were created by a law enforcement unit of the district for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(1). You do not inform us, however, as to whether these documents are maintained by the district's police department. Accordingly, we must rule in the alternative with regard to the applicability of FERPA to documents B3 through B36 and C11 through C14. To the extent that documents B3 through B36 and C11 through C14 are not maintained by the district's police department, we conclude that information contained in those documents that reveals the identities of students is confidential under FERPA. Thus, to the extent that FERPA is applicable to documents B3 through B36 and C11 through C14, we agree that the student-identifying information that you have redacted must be withheld from the requestor unless FERPA authorizes its release. To the extent that FERPA is applicable to the hand-written affidavits of students submitted as documents B12-B13, B15-B16, B18-B19, B21-B22, B24-B25, B27-B28, and B30-31, those documents must be withheld in their entireties unless FERPA authorizes their release. *See* 34 C.F.R. § 99.3 ("personally identifiable information" under FERPA includes, among other things, "[o]ther information that would make the student's identity easily traceable"); Open Records Decision No. 224 (1979) (release of document in student's handwriting would make student's identity easily traceable). You also assert that FERPA is applicable to information that you have marked in documents B3 through B6 and B9. You contend that the release of the marked information would reveal the identities of the students to whom it pertains. Based on your representations and our review of the information at issue, we agree that to the extent that FERPA is applicable to the information that you have marked in documents B3 through B6 and B9, you must also withhold that information unless FERPA authorizes its release.

To the extent, however, that documents B3 through B36 and C11 through C14 are records maintained by the district's police department, such documents do not constitute "education records" for purposes of FERPA. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(1). Therefore, to the extent that the district's police department maintains documents B3 through B36 and C11 through C14, the district may not withhold any information contained in such documents under FERPA or under section 552.114 of the Government Code.

Because our determinations under FERPA and section 552.114 are not dispositive, we must address your other arguments under section 552.101. This section also encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Indus. Found. v. Texas*

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[2]You state that the district has released documents B1-B2. Although you refer in your arguments to documents C1-C15, the submitted documents do not include a document C15.

Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy under section 552.101 protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See, e.g.*, Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

Common-law privacy under section 552.101 also encompasses certain types of personal financial information. Prior decisions of this office have determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about an individual and basic facts regarding a particular financial transaction between the individual and the public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy addressed in *Industrial Foundation* to records of an investigation of alleged sexual harassment. The information at issue in *Ellen* included third-party witness statements, an affidavit in which the individual accused of misconduct responded to the allegations of sexual harassment, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

You contend that the documents submitted as Exhibit B contain personal financial information that is protected by common-law privacy under section 552.101. You also argue that Exhibit B contains information that relates to sexual harassment of students and is therefore private under section 552.101 and *Morales v. Ellen*. Having considered your arguments and reviewed the information at issue, we conclude that this information is not

part of an investigation of alleged sexual harassment for purposes of *Morales v. Ellen*. *See* 840 S.W.2d at 523 (addressing considerations relevant to sexual harassment in the workplace). Therefore, the district may not withhold any of the information in Exhibit B under section 552.101 in conjunction with privacy under *Ellen*. Furthermore, we find that the public has a legitimate interest in the information that you seek to withhold, inasmuch as this information relates to conduct that occurred in the public schools and involved a volunteer who was officially affiliated with the district. We therefore conclude that the district may not withhold any of the information in Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy. *Cf. Arlington Indep. Sch. Dist. v. Texas Attorney General*, 37 S.W.3d 152, 161 (Tex. App.—Austin 2001, no pet.) (results of school district's school effectiveness survey were "precisely the sort [of information] that should be publicly accessible to foster candid and frank discussion), *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*) (public is legitimately concerned with names and qualifications of candidates for presidencies of state universities); Open Records Decision Nos. 526 at 1-2 (1989) (constitutional and common-law privacy rights recognized under statutory predecessors to Gov't Code §§ 552.101 and 552.102 do not prohibit public release of information relating to professional public school employees that constitutes basis for their employment), 464 at 2 (1987) (public certainly has interest in manner in which administrators at public universities perform their official duties), 441 at 3 (1986) (public has legitimate interest in identities of school personnel who did not pass Texas Examination of Current Administrators and Teachers (TECAT) examination).

Next, we address your claim under section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1),

meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert that documents C1 through C10 contain information that is protected by the attorney-client privilege under section 552.107(1). You inform us that documents C1 through C3 are pages from a letter that was drafted for the district by one of its attorneys. You also inform us that documents C4 through C5 document legal advice that was provided to the district by one of its attorneys. You state that documents C6 through C8 contain communications between the district and one of its attorneys. You also state that documents C9 through C10 contain notes that document a communication between an employee of the district and one of its attorneys. You explain that the attorney-client communications contained or reflected in documents C1 through C10 were made in confidence in connection with the rendition of professional legal services. Based on your representations and our review of the documents in question, we marked the information in documents C1 through C10 that is protected by the attorney-client privilege. The district may withhold that information under section 552.107(1).

You also raise section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. A governmental body may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep his or her section 552.117 information confidential. You inform us that documents D1-D5 relate to employees of the district who timely elected not to allow public access to their home addresses, home telephone numbers, and social security numbers. We therefore conclude that the district must withhold these employees' home addresses, home telephone numbers, and social security numbers under section 552.117(a)(1).

In summary: (1) the district may withhold the information in documents C11 through C14 that is protected by the attorney-client privilege under Texas Rule of Evidence 503; (2) the district must not release information contained in documents B37-B40 that identifies the parent or the student unless the district has authority under FERPA to do so; (3) to the extent that documents B3 through B36 and C11 through C14 are not maintained by the district's police department, the information contained in those documents that reveals the identities of students is confidential under FERPA, and the district must withhold the redacted student-identifying information, the hand-written affidavits of students, and the marked information in documents B3 through B6 and B9 unless FERPA authorizes the release of that information; (4) the district may withhold the information in documents C1 through C10 that is excepted from disclosure under section 552.107(1); and (5) the employees' home addresses, home telephone numbers, and social security numbers in documents D1-D5 are excepted from disclosure under section 552.117(a)(1). With the exception of information that is protected by Texas Rule of Evidence 503, FERPA, section 552.107(1), or section 552.117(a)(1), the requested information must be released.[3]

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

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[3]We note that the submitted documents also contain other information that the district would ordinarily be required to withhold from the public under FERPA and sections 552.101, 552.114, and 552.137 of the Government Code. In this instance, however, the requestor has a special right of access to this information. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10; Gov't Code § 552.023(a). Should the district receive another request for this information from a person who would not have a right of access to it, the district should resubmit this same information and request another decision. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 197782

Enc: Submitted documents

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